

# The Facts v. the Brochure

The Interior Department attempts to cover up incompetence and fraud in its handling of Individual Indian Money Accounts in a glossy new “progress report.”



When I first saw the glossy brochure the Interior Department recently produced about the long-troubled Indian Trust, I was stunned. It reminded me of what Sen. John McCain, R-Ariz., said at a 1999 hearing of the Senate Indian Affairs Committee.

“...The Interior Department,” he said, “has persistently failed to own up to its own mistakes and fulfill its basic responsibilities to Native Americans whose money is in the hands of the United States...Even more troubling is a very questionable commitment to properly follow through on Indian trust fund management policies and procedures.”

I think their new report, titled "Historical Accounting for Individual Indian Monies: A Progress Report" illustrates that six years after Sen. McCain made those comments little has changed at the Department of Interior.

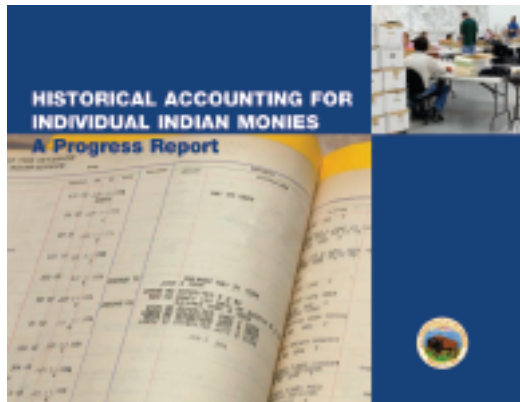
Don't take my word for it. Read their report and our attached rebuttal.

I'm so convinced that our analysis is correct that I challenge Interior to submit their report to the courts where it can be reviewed and studied independently, with witnesses under oath and facing the risk of perjury. If Secretary Norton believes her report tells the truth about the Indian Trust, she will quickly offer this report to the courts.

But having watched the evidence of Trust mismanagement continue to mount during nearly 10 years of litigation, I have no doubt that Interior still cannot bring itself to admit the truth about what former Interior Secretary Bruce Babbitt acknowledged was “the long and sorry history of the department's mismanagement of the Indian Trust funds.”

Sincerely,

Elouise Cobell  
Member, Blackfeet Tribe  
Browning, Montana  
Lead Plaintiff, Cobell versus Norton



The Interior Department has recently published a “progress report” on its handling of Individual Indian Money accounts. This report, like most of the Department’s assurances on this issue, is deceptively inaccurate from

beginning to end. It assures us that management of IIM accounts has been satisfactory, availability of financial records is good, and the losses suffered by hundreds of thousands of Indians, to whom Interior owes fiduciary responsibilities, are insignificant. All three assertions are patently false.

Evidence to the contrary is overwhelming. Hundreds of reports, findings, and studies from the Congress, the GAO, Inspectors General, Federal Courts, and the government’s own experts, stretching from the early 20th Century to the early 21st Century, have concluded that the handling of these accounts has ranged from incompetent to fraudulent. Not one study in these hundreds has concluded that there is not a

large and serious problem. Interior Department officials have repeatedly acknowledged in courtroom and Congressional testimony that the management of these accounts has been terrible. The Department’s own internal report, based on the work of experts it hired, concluded in 2002 that this mismanagement had created a liability of \$10 to \$40 billion to the Native American beneficiaries.

Consider just a few declarations of the Court of Appeals that has been examining the problem through the Cobell v. Norton case for over nine years:

*“Dismal history of inaction and incompetence.”*

*“Unconscionable”*

*“Hopelessly inept management of the IIM accounts.”*

*“[T]he trusts at issue here were created over one hundred years ago ... and have been mismanaged nearly as long.”*

*“Malfeasance”*

*“Egregiously breached their [Interior’s] fiduciary duties.”*

The District Court has been equally disgusted, stating in July of this year: “The entire record of this case tells the dreary story of Interior’s degenerate tenure as Trustee-Delegate ... a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy, the end of which is nowhere in sight.”

Now, the Interior Department apparently expects readers of its brochure to ignore those decades of powerful evidence and accept its conclusion that all is well.

If the Interior Department officials actually believe what they are saying, we challenge them to submit this report, under oath, to the District Court to be examined for accuracy and validity in a venue where penalties for perjury are available. Failure to do so, particularly in light of Interior’s well-documented history of false statements about this matter (even in sworn, Congressional and courtroom testimony), should speak powerfully to anyone tempted to place confidence in this latest effort to confuse and mislead.

## Ignoring the Law

It is important to understand at the outset that the “progress” about which Interior so glowingly reports is essentially the partial implementation of a self-concocted plan that bears no resemblance to what the law requires or to generally accepted accounting principles. Six years ago the Federal District Court ruled and the Court of Appeals affirmed in 2001 that Interior had an obligation to account for “all funds, no matter when deposited.”

Nevertheless, the Department unilaterally decided to spend millions of tax dollars on another plan that is patently inadequate and inconsistent with both the law and those court rulings. The Department is now issuing a self-congratulatory report on its progress down this blind alley.

It is worth noting in this context that one of the most seriously misleading aspects of this report is the assertion that the Department’s legal obligation to render a proper accounting did not begin until the passage of the 1994 American

### IN SEPTEMBER 2005, INTERIOR PROCLAIMED:

“In passing the American Indian Trust Fund Management Reform Act of 1994 (the 1994 Reform Act), Congress **imposed** the following duty on the Secretary of the Interior:

The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian that are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a).

“Historical Accounting for Individual Indian Monies,” p. 5.

### FOUR YEARS EARLIER, IN 2001, THE D.C. CIRCUIT COURT OF APPEALS HAD ALREADY RULED:

“Therefore, the 1994 Act **reaffirms** the government’s **preexisting fiduciary duty** to perform a complete historical accounting of trust fund assets.” *Cobell v. Norton*, 240 F.3d 1081, 1103.

“Nothing in the 1994 Act, nor any other federal statute, acts to limit or alter this right [to a complete accounting].” *Id* at 1103.

***In other words, the 1994 Act did not “impose” or create any duty. It merely “reaffirmed” a preexisting duty. This critical fact has been conclusively found by the Court of Appeals.***



*Decrepit barn used for storage of trust records, according to senior Interior official Raymond Springwater. When it filled to overflowing, they simply threw the records away to make more room, he testified under oath in Cobell v. Norton.*

Indian Trust Fund Management Reform Act. Nothing could be further from the truth. It is a fundamental principle of trust law that this requirement begins at the moment a trust relationship is established.

That principle was affirmed by the Court of Appeals which clearly stated that the accounting obligation began when the first trusts were created—in 1887—expressly rejecting Interior’s assertion that it began in 1994. It should be noted that the Interior Department did not appeal that, therefore final, decision.

It is basic to our system of government that the courts are responsible for determining the meaning of the law. The Courts have done that. But, Interior did not like the outcome, so it pursued its own legally deficient plan.

### **Cherry Picking the Evidence**

The deception and inaccuracy of this “progress report” is amply illustrated by an examination of what Interior decided to analyze and how it went about it. These choices were uniformly self-serving, looking in places where problems were least likely to be found using methodologies least likely to identify shortcomings.

As noted above, the Department decided to look only at accounts existing in 1994, in effect

ignoring the decision of the Court of Appeals discussed above, granting itself a pardon, and denying some of America’s poorest citizens redress for misconduct over most of the 118 year history of the trusts. All evidence and simple logic indicate that errors and fraud were more likely in the earlier years of these accounts.

In 1915 the report of the Joint Commission of Congress on Indian Funds warned of “*fraud,*

*corruption, and institutional incompetence beyond the possibility of comprehension.*”

Having decided to ignore everything prior to 1994 without any legal basis to do so, the Department then decided to ignore most of the accounts and transactions since that date. Interior’s report admits that it focused most of its effort on the Judgment and Per Capita accounts, claiming to have “reconciled” accounts representing some 56% of the total value. But, these accounts represent a small portion of the transactions. More importantly, they are also the simplest, least likely to be subject to error or fraud, the “low-hanging fruit” as Interior itself has admitted.

Only a miniscule portion of Land-Based accounts were “reconciled.” These are by far the largest, and most complicated. Land-Based accounts involve the great majority of all transactions over the 118 year history of these accounts.

The sad fact is that *the government has “reconciled” less than one-half of one per cent of the transactions and accounts for which it is legally and morally responsible.*

Even more to the point, “reconciling” is not “accounting.” Interior considers a transaction to be “reconciled” even if no confirming documents whatsoever can be found. This sleight of hand is



particularly egregious since the vast majority of all trust records have been destroyed in violation of the law. Interior, in essence, counts as “reconciled” all transactions where the paper trail has been successfully destroyed.

If, for example, a document exists stating that mineral rights were leased on a certain piece of land, belonging to a particular Indian, Interior considers the account “reconciled,” *even if no documentation exists to show that royalties were ever collected or ever distributed to the rightful owner.*

In its discussion of Land-Based accounts, the Department is at great pains to justify the use of “statistical sampling” to try to deal with the vast



*Bureau of Indian Affairs Superintendent, Department of Justice Lawyer, and Special Master try to get a look at trust records the only way they could under the circumstances. The building they were stored in had been condemned for several years, and the staircase had fallen in.*

majority of transactions involving less than \$100,000. That approach founders on three issues: There is no reason to believe that the accounts sampled are representative of the entire universe and ample reason to believe that they are not; the Department’s own expert has testified that he is aware of no instance in the history of accounting—not one—when sampling has been used as a substitute for accounting; and the use of sampling rather than real accounting contradicts the rulings of both the District Court and the Court of Appeals noted above.

## Garbage in Garbage Out

Amazingly, unless one is familiar with the government’s pattern of behavior on this issue, only two of the reports and studies on which this “progress report” is based have ever been presented for public and expert scrutiny. Those two have been thoroughly discredited. That says something about the credibility of the other, unexamined studies purposely hidden from public scrutiny and the comforting conclusions drawn from them.

One of the two discredited studies is an “analysis” conducted by “Interior and a partner at Ernst & Young.” The artful wording of the attribution is instructive. This “analysis,” which looked at the accounts of only five individuals and which cost the government \$21 million, fell so far short of a proper accounting procedure that Ernst & Young refused to allow its name to be placed on it. Interior said it accounted for all but one approximately \$60 transaction. But, the truth is, the analysis contained no confirming documentation for 99% of the transactions within its scope. The E&Y partner admitted that he had made no effort to verify independently any of the documents and information presented to him by Interior, upon which the entire “analysis” was based. The Cobell plaintiffs invited Interior to test the validity of its \$21 million project in Federal Court. Not surprisingly, the Department refused. What do you think Interior is afraid of?

The other “analysis” was conducted by Arthur Andersen. This also was not a legitimate accounting exercise but subject to “agreed-upon procedures,” which means that generally accepted accounting principles were not applied. Rather, the accountants looked only at those records and documents given to them by the client under rules agreed to by the client. Not surprisingly, after its release, it was slammed by the GAO in 1996. The GAO noted, among other serious shortcomings, that some \$2.4 billion of the tribal trust transactions analyzed had absolutely no supporting documentation and the vast majority of the rest



*The condition of these records shows the low regard Interior officials had for irreplaceable trust records. This picture shows storage in a manner that led to their deterioration and destruction. Included were vital leases, transaction records, and oil and gas files.*

had inadequate support. Of greater importance is the fact that the professional accountants who performed the analysis concluded that no further accounting work should be conducted because the vast majority of trust records had been destroyed and any conclusions would be inadequate, inaccurate and unreliable.

## Not Finding What You're Not Looking For

Interior's brochure makes much of a "meta-analysis" of more than 300 "audit and reconciliation studies." Though the analysis is not yet complete, the Department reports that no serious problems have been found. (It should be noted that one of the studies reviewed was the discredited Arthur Andersen exercise noted above.) There is, says the brochure, "no evidence of fraud or systemic abuse." Before this project is finished, we have a few suggestions of where to look. In addition to those noted above, they include:

- **1989 Congressional Report:** "Fraud, corruption and mismanagement pervading the institutions that are supposed to serve Native Americans."
- **5/99, 11/00, 10/01, 8/03, 9/03, 12/04, 9/05 Reports** from National Archives, Special Trustee, Special Master, and admissions by the government that huge quantities of documents relating to IIM transactions had been intentionally destroyed.

- **1998 Interior** tells court it cannot produce trust documents as ordered because they are covered with mouse droppings and there is concern about Hantavirus.
- **1999 Interior Assistant Secretary Kevin Gover** testifies that the IIM system is "broken."
- **2003 OIG Audit:** Interior fraudulently "recreated and backdated" documents relating to Indian oil and gas royalties.
- **2001 Court of Appeals ruling:** the "magnitude of the government's malfeasance" justifies Court "supervision and oversight of Interior's failed trust reform effort." Interior, "still unable to execute the most fundamental of trust duties."
- **2005 District Court Opinion:** Interior has illegally withheld trust payments to Indians, many living in poverty, falsely blaming it on the ongoing litigation, calls this behavior "an obscenity ... profane and repugnant to the fundamental principles of government."

## Conclusion

The Court of Appeals has repeatedly condemned government lawyers for "mischaracterizing," "misrepresenting," and "misleading" the Court about the Indian Trusts. We have attempted in this brief response to highlight only some of the misleading and inaccurate parts of this "progress report." It is the latest example of just the sort of conduct that the Court of Appeals has cited. It is also powerful evidence that on this issue our government has made no "progress" toward meeting its minimal obligation of candor and decency toward some of the poorest and most defenseless among us.

For additional information on flaws and falsehoods in Interior's so-called progress report, please contact Keith Harper, Esq., Native American Rights Fund, counsel to Cobell Plaintiffs. He can be reached at 202-785-4166.

“...[I]n my judgment, there will probably have to be some kind of an agreed settlement on the issue because of the problematic—the problem of finding all the source documents.... [B]ecause we can’t do an accounting, I can’t refute [how much the Indians say they are owed]. That’s the problem.”

—*Former Assistant Interior Secretary for Indian Affairs Neal McCaleb, to ABC’s Sam Donaldson in an interview on February 15, 2002.*